IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 2224 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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HARUNBHAI HAJI HABIBBHAI GHETA & 2 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR TUSHAR L SHETH for Applicant(s) : 1 - 3.
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR YATIN SONI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 01/08/2007

ORAL JUDGMENT

Rule. Mr.M.R.Mengdey, learned APP waives service of rule on behalf of respondent No.1. Mr.Yatin

Soni, learned Advocate waives service of rule on behalf of respondent No.2.

1. Present application has been filed by the petitioner – original accused under Articles 226 and 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code to quash and set aside the judgment and order dated 30.08.2006 passed by the learned J.M.F.C., Upleta by which the learned J.M.F.C., Upleta directed to hand over the gold ornaments to respondent No.2 – herein. It is also further prayed to quash and set aside the order dated 13.10.2006 passed by the Revisional Court in Revision Application No. 56 of 2006 by which the order dated 30.08.2006 passed by the learned J.M.F.C., Upleta is confirmed.

2. A criminal complaint is registered at Upleta Police Station against the petitioner on 04.04.2006 for the offences punishable under Section 323, 406 and 114 of the Indian Penal Code and after submission of the charge-sheet same is registered as Criminal Case being 550 of 2006, that; during the course of the investigation *Stridhan* articles were recovered from

the petitioner; that respondent No.2 preferred an application dated 14.06.2006 before the learned J.M.F.C., Upleta for recovery of *Stridhan* articles and cash amount and the same came to be allowed by order dated 30.08.2006. Being aggrieved and dissatisfied with the order dated 30.08.2006 passed by the learned J.M.F.C., Upleta in allowing the application of respondent No.2 for possession of *Stridhan* articles and cash amount, the petitioner preferred Revision Application being Revision Application No. 56 of 2006 in the Court of Presiding Officer and 13th Fast Track Court, Gondal and the same came to be rejected *vide* order dated 13.10.2006. Being aggrieved and dissatisfied with the both the orders the petitioner has preferred the present petition under Articles 226 and 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code.

3. Mr.Tushar Sheth, learned Advocate appearing on behalf of the petitioner has vehemently submitted that the impugned order dated 30.08.2006 by the learned J.M.F.C., Upleta has been passed without giving any opportunity to the petitioner. It is

submitted that the learned J.M.F.C., Upleta issued notice dated 24.07.2006 to remain present on 28.07.2006, but the same was served upon the petitioner on 31.07.2006 through courier. Thereafter, no hearing has taken place and impugned order has been passed by the learned trial Court without giving any opportunity to the petitioner. It is submitted that aforesaid was pointed out to the learned Revisional Court, still the Revisional Court has not considered the same. It is submitted that even on going through Record and Proceedings it will be clear that there were no proceedings between 26.06.2006 to 16.10.2006 meaning thereby no hearing has taken place in between which fortifies the case on behalf of the petitioner that impugned order has be passed without giving any opportunity to the petitioner. It is submitted that though in the Record and Proceedings there is application dated 24.07.2006, there is no reference to the same in the Rojkam. It is submitted that the fact that only four days time was mentioned in the Notice period, that itself is suggestive of so many things. Therefore, it is requested to allow the present application and quash and set aside the orders passed by both the Courts below.

4. On the other hand Mr.Yatin Soni, learned Advocate appearing on behalf of respondent No.2 has submitted that the petitioner appeared before the trial Court on 25.08.2007 and prayed for time and thereafter, impugned order dated 30.08.2006 has been passed; that itself is suggestive that the petitioner was aware of the proceedings prior to the passing of the impugned order dated 30.08.2006. The contention on behalf of the petitioner that no opportunity has been given to the petitioner is not correct, and therefore, it is requested to dismiss the present application. Learned Advocates appearing on behalf of the respective parties have also tried to submit the case on merits, however, considering the Rojkam and Record and Proceedings which is called from the trial Court, this Court is of the opinion that the matter deserves remand and impugned orders are required to be quashed and set aside on ground that the order dated 30.08.2006 by the learned J.M.F.C., Upleta, has been passed without giving any opportunity to the petitioner, this Court is not considering the submissions made on behalf of the respective parties on merits.

5. On going through Record and Proceedings, it appears that respondent No.2 submitted an application for handing over of *Stridhan* to her before the learned J.M.F.C., Upleta on 14.06.2006 and by order dated 17.06.2006, learned J.M.F.C., Upleata issued notice on the said application making it returnable on 22.06.2006 (within five days). It appears from the record that even one application was submitted by respondent No.2 requesting for service of notice by RPAD as the petitioner was residing at Bhivindi, Maharashtra. It also appears from the record that thereafter, notice was issued upon the petitioner on 24.07.2006 making it returnable on 28.07.2006 (again within four days). It is to be noted that the petitioner is residing at Bhivindi, Maharashtra and it was not possible to serve notice at Bhivindi, Maharashtra within four days. It appears that the same was send by courier. It also appears that there is no order to send the notice by courier. It is the case on behalf of the petitioner that the said notice was issued on 24.07.2006 to remain present on 28.07.2006, however, the same came to be served upon the petitioner through courier on 31.07.2006. It appears from the record that the learned Advocate appearing on

behalf of the petitioner on 25.08.2006 prayed for time. On going through the Record and Proceedings and application dated 25.08.2006 praying for time, it appears that the learned Judge has passed an order “granted“ but date has not been given and the impugned order has been passed on 30.08.2006. This Court has also considered the Rojkam and this Court is at pains to note that the Rojkam is not prepared fully and throughly. On considering the Rojkam it appears that after dated 26.06.2006 next date mentioned in the Rojkam is dated 16.10.2006 and considering the record, aforesaid applications dated 14.06.2006 and 24.07.2006, application for adjournment dated 25.08.2006 and the order dated 30.08.2006, no such proceedings are drawn in the Rojkam. Thus, considering the above it appears to the Court that proceedings are not drawn in the Rojkam correctly and attention of the learned District and Sessions Judge is to be drawn with regard to the same. It appears that the impugned order dated 30.08.2006 is passed by the learned J.M.F.C., Upleta without giving any opportunity to the petitioner and as the same is in breach of principles of natural justice, deserves to be quashed and set aside.

Though aforesaid facts were pointed out to the learned Revisional Court, the learned Revisional Court i.e. 13th Fast Track Court, Gondal has not considered and not dealt with the same. Under the circumstances, without entering into merits of the case, impugned order dated 30.08.2006 passed by the learned J.M.F.C., Upleta directing to hand over *Stridhan* to respondent No.2 and the order passed by the Revisional Court i.e. Presiding Officer and 13th Fast Track Court, Gondal in Revision Application No. 56 of 2006, requires to be quashed and set aside and the matter is to be remanded to the learned trial Court for considering the applications submitted by respondent No.2 for returning / handing over *Stridhan* and cash amount to respondent No.2 afresh.

6. For the reasons stated above, the petition succeeds in part. The order dated 30.08.2006 passed by the learned J.M.F.C., Upleta in Criminal Case No. 35 of 2006 as well as the order dated 13.10.2006 passed by the Revisional Court in Revision Application No. 56 of 2006 are hereby quashed and set aside. The matter is remanded to the learned trial Court for deciding the same afresh in accordance with law and after

giving opportunity to all the parties inclusive of respondent No.2 and considering the facts stated above and the fact that the notices are made returnable by the learned trial Court, Upleta within a period of four days only, knowing fully well that the petitioner is residing at Bhivindi, Maharashtra and it is not possible to serve notice upon the petitioner within four days, same deserves consideration and speaks volumes about the learned J.M.F.C., Upleta.

Under the circumstances, learned District and Sessions Judge, Rajkot is to see that the matter is not placed before the concerned learned J.M.F.C. who has passed the earlier order and be heard by any other learned J.M.F.C. The learned District and Sessions Judge, Rajkot is also directed to see that Subordinate Courts under his control and supervision, the Rojkam are written and prepared throughly and accurately as in the present case as stated above correct and accurate proceedings are not written in the Rojkam. The learned District and Sessions Judge, Rajkot is also directed to look into the Rojkam prepared in the present case which is referred to herein above and ask explanation of the concerned learned J.M.F.C., Upleta

for not writing / preparing Rojkam accurately and why every days' proceedings are also not mentioned in the Rojkam. Rule is made absolute to the aforesaid extent. Record and Proceedings be sent to the trial Court immediately with a Writ to the learned District and Sessions Judge, Rajkot.

[M.R.Shah, J.]

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